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ALEXANDER L. STEVAS,
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NO: 83-1506

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

W.J.TERRY, Petitioner

v.

HANS BOTHKE, Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION
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SUMMARY ARGUMENT

The decision below was in accordance with the body of law upheld and confirmed by courts on all levels covering the complyance of Revenue employees with Section 6213 of the Internal Revenue Code, 1954, 26 U.S.C..

The section prohibits an assessment of a deficiency and levy without the issuance of a statutory notice of deficiency, which is the prerequisite for a redetermination in the U.S.Tax Court.(Writ,App.F) The notice affords the safeguards of due process

requirements secured by the Fifth Amendment to the U.S.Constitution.

The scholarly rendered decision by the court below, Bothke v.Terry, 713 F 2d 1405 does not require extensive reiteration herein and speaks for itself. In addition thereto respondent Bothke submits that a qualified immunity granted to Terry could not be justified under any law or authority based on the facts in the record and would constitute a mockery of justice due to Terry's violations of law during the litigation proceedings alone of which this Court should be informed. Terry committed several times perjury by submitting false statements under oath into the record. Specifically that: "There is a notice*** it showed the correct balance of tax." (RT 1 p 25 L.13) (Exhibit 50,in the record shows that no tax was owed and that Bothke's levied property was returned to him during following litigations.)

"There was an assessment" (RT p.26 L 9&10)
(Exhibit 50 proves to the contrary).
"There was an assessment and that was the tax due on the return." (RT 1 p 24 L 3)
(Bothke's tax return does not show any tax due.(RT 1 p. 7 L 11&18;Writ App.G).
(Terry never saw Bothke's return)(Writ 4a)
Terry's conduct as set forth is in violation of Title 18,U.S.C. Sect.241,242,1001, Sect.7214 (a)(7) 26 U.S.C. Internal Revenue Code.
Furthermore,Terry's submitted declarations under oath were not made on personal knowledge as required pursuant to Rule 56(e) of the Fed.Rule of Civ.Procedure.Terry swore under oath to Bothke's delinquent taxes and alleged existing assessment which did not exist as the record shows.(CR 15 p. 9;CR 25 p.1 & 3;CR 35 p.5)
Terry swore to these matters without having personal knowledge of the same,inspite of her admitted authorized investigating power.

Terry also submitted a fraudulent document into the record,specified as a "Blue Ribbon Certificate of Assessment" to which she swore that it is true and correct in spite of the fact that no assessment existed and that such document has no authority under any section of the Revenue Code.(CR 25 p. 6 & 7;CR 25 p.1)

Additionally Terry failed to answer to the complaint and failed to file opposing papers to Bothke's motions.

She also failed to comply with discovery rules inspite of the District Court's Order to do so.(CR 33,37,41)

These violations were condoned by the District Court inspite of Bothke's strong opposition.(CR 28,34)

The Ninth Circuit failed to address these violations in its decision.

In light of the foregoing violations alone, any type of immunity granted to Terry would constitute a reward for violating undispu-

table established law and thereby would declare the same as null and void by the failure to enforce it.

Terry's admittance that Bothke's protection under Section 6213,26 U.S.C. was violated (Writ p.8,10 & 11) raises no question of law at issue that justifies the grant of a writ of certiorari here.The lower Court's decision is not in conflict with other Court of Appeals and this Supreme Court on the same matters.

FACTS.

Bothke sets forth the salient facts of this case because of inaccuracies and misleading statements in the petition for a writ of certiorari.

1. Bothke's property was levied by Terry without affording Bothke a statutory notice of deficiency pursuant to Section 6213 (a) 26 U.S.C. a prerequisite for a redetermination in the U.S.Tax Court.(writ App.F) Section 6213 (a) states in part:

> "**no levy shall be made,begun or prosecuted until such notice has been mailed to the taxpayer,nor until***if a petition has been filed with the tax court,the decision of the tax court has become final." (writ App.F)

2. Bothke was not afforded the opportunity for a hearing pursuant to the safeguards of procedural due process pursuant to Sect.6213(a)& (b) 26 U.S.C. secured and in harmony with the Fifth Amendment to the U.S.Constitution which states in part:

> "No person shall be***deprived of ** property,without due process of law."

3. Terry failed to state which safeguards she had afforded to Bothke under the due process requirements.

4. Bothke was not afforded an audit,a statutory notice of deficiency nor due process.

5. No statutory assessment existed in Bothke's 1977 tax matters.

6. Bothke's return indicated a refund. (writ p.32a) (Contrary to Terry's statement under oath)(RT 1 p.24 L 3)

7. Terry did not ever see Bothke's return. (Writ p.4a) She proceeded to levy without the return.

8. Terry's duties included to investigate. (Writ p.3,10a,17a)

9. Terry was warned twice by Bothke that she proceeded illegally.(Writ p.15a)

10. Terry played the role of prosecutor, judge,juror and marshal executing the judgment as well.(Writ p.10a)

11. Terry was with the I.R.S. six years at the time of the levy.(Interr.No:2)

12. Terry stated under oath that she was aware of the language of Section 6211, 6212,6213,and 7214 of the Internal Revenue Code,26 U.S.C..(Interr. No:3)

13. Terry acted on her own behalf.(Interr. No: 22)

14. Terry on page No: 2 of her writ states that a notice of correction of arithmetic was sent to Bothke pursuant to 26 U.S.C.,Section 6213(b).(Writ p.2)

An inspection of the notice shows:

(a) No reference to Section 6213(b) is indicated as falsely alleged by Terry.

(b) No alleged error is set forth therein nor any explanation thereof as required pursuant to Sect. 6213(b)(1) which states:

> "Each notice under this paragraph shall set forth the error alleged and an explanation thereof." (writ p.29a)

(c) No indicated time limit within which to respond.

(d) in part: "Please let us know if you believe the balance due is incorrect for reasons other than uncredited payments." (App.A,infra.)

15. Bothke responded promptly as suggested on the notice,without citing any legal classification.(writ App.H).

ARGUMENT.

The legal principles which govern this instant decision have been well established by this court and the federal courts for many years.

The following authorities will be sufficient to establish that the set forth facts are in accordance with the overwhelming weight of judicial authority: Schmidt v. C.I.R.,(CA,9,1959) 272 F 2d 423;American Acceptance Corp. v.U.S.,(CA,9,1977) 550 F 2d 1220; Fendler v.C.I.R.,(CA,9,1971) 441 F 2d 1101;Bromberg v.Ingling,(CA,9,1962) 300 F 2d 859; Stankevitz v.I.R.S.,(CA,9, 1981) 640 F 2d 205.

There can be no dispute that Section 6213,Title 26 U.S.C. is a statute passed by Congress and approved by the president with the built in safeguards of the Fifth Amendment securing procedural due process relative property and federally protected rights.

In light of the herein set forth facts and law,Terry's argument that she did not violate clearly established constitutional and statutory rights of Bothke (writ p.7 & I)when in fact Terry levied Bothke's property without procedural due process,and

her plea that the violation of a statutory right is not sufficient to abrogate an officials immunity to a constitutional damage action is so palpably bad and frivolous that one should asked himself, why do laws exist if they are not enforced, especially against government employees?

The U.S.Supreme Court has already expounded the law relative statutory and constitutional rights in U.S.v.Lee, 106 U.S. 196 quoted in Butz v.Economou, 438 U.S.478(1978) by stating:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defyance, with impunity. All the officers of the government from the highest to the lowest, are creatures of the law and are to obey it. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases; Statutes which have been passed by both branches of congress and approved by the president, that the courts can not give remedy when the citizen has been deprived of his property by force, his estate seized** without any lawfull authority, without any due process of law and without compensation, because his officers are in possession? If such be the law of

this country,it sanctions tyranny which has no existence in any government which has just claim to well regulated liberty and the protection of personal rights."

Also in Bell v.Hood,327 U.S.678(1946)

the U.S.Supreme Court had established:

"Where federally protected rights have been invaded;it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The decision below,scholarly has followed the law of the land in harmony with previous rendered decisions of this court by being alert and give remedy to Bothke for invasion of federally protected rights.

On page two of her writ,Terry states that a notice of correction of arithmetic was sent to Bothke pursuant to 26 U.S.C., Section 6213(b).

To prove that this statement is false,we only have to look at the facts No: 14 and 15,supra.These facts demonstrate clearly Terry's employed trickery and deceit before this Court,as the notice sent to Bothke bears none of the requirements of

Section 6213(b) as claimed by Terry.The notice is clearly a spurious document,as it failes to show any legal classification, time limit within to respond,set forth error and explanation thereof.(APP.A)

Terry's shortcommings and false statements were readily recognized and exposed by the lower court in its decision at page 15a and 16a (writ) putting Terry's expertise,the obligation to know her own governing statutes and to apply them realistically,to a test which she miserably failed.

It must be realized that Terry had free I.R.S.Counsel available to her at all times in addition to her investigating authority.

In light of the fact that ignorance of the law is no excuse,and that the notice is a spurious document without authority under the Internal Revenue Code,it suffices that Terry lied again.

In accordance with the fact that no

statutory assessment existed,notice of deficiency proceedings were mandated in Bothke's case pursuant to Section 6213(a). Accordingly Terry's plea for immunity is unsupported by law and frivolous.

Also Terry's immunity plea under Section 6331(a) is without merit since this Section makes distinctly clear that it can only be applied if a person is liable to pay any tax,(writ App.30a) which Bothke was not as the record shows.

The U.S.Supreme Court recognized in Flanders v.Tweed,16 Wall(US) 504,21 L ed 389,already then:

> "THat a party cannot be held to have acted under color of law or by virtue of an act of Congress which did not confer any authority upon him, or any other person,to perform the act,which is in controversy***." and
>
> "Whenever a person sued sets up a defense that he was an officer or employee of the government acting under color of law,it plainly devolves upon him to show that the law which he invokes authorized the act in question to be done,and that he acted in good faith; But nothing of the kind is shown in this case."

Which is also applicable to this instant case based on the facts in the record as set forth herein.

In Great Northern L.Ins.Co.v.Read,322 U S 47,88L Ed 1121,64 S.Ct.873,the importance of the equal protection of the law was well recognized by stating:

> "With us every official from the Prime Minister down to a tax collector is under the same responsibility for every act done without legal justification as any citizen."

and that:

> "An officer who acts wrongfully is liable in a civil action and cannot claim immunity of the sovereign." Tracy v.Swartwout,10 Pet.(U S)80, 9 L Ed 354.

In light of the set forth authorities and Terry's unauthorized conduct,she can not claim to be held immune and her request for immunity is clearly frivolous and shocking to the senses.

Terry falsely claims that the lower Court determined that administrative actions of her have violated Bothke's rights

and a provision of the Internal Revenue Code.(writ P.I) Simple inspection of page 13a in Terry's writ substantiates the fact that the Ninth Circuit by quoting Mark v. Groff,521 F 2d 1380-81,established:

> "Levying is ministerial rather than discretionary activity."(writ App.28a)

The language in Section 6213 cannot be clearer with its intent as set forth in fact No: 1,supra, and is definately not subject to discretionary action. In Kujich v. Lillie,Mont.260 P 2d 383,389,390, and Anderson v.Gile,172 P 2d 583,586,119 Mont. 182, the courts established that:

> "Defined rule ends discretion,and that discretion denotes absence of hard fast rule."

Section 6213 is a clearly established and defined law not subject to discretion and Terry's claim is again clearly frivolous without merit as it finds no support in law.

Throughout Terry's unsubstantiated ramblings including her submitted Brief

Amicus Curiae, she claims falsely to hold the position of a public official.

A simple inspection of the following authorities establishes that:

> "A plublic official is a person who upon being issued a commission, taking required oath, enters upon, for a fixed tenure, a position called office, where he or she exercises in his or her own right some of the attributes of sovereign he or she serves for the benefit of public." Macey v. Heverin, 408 A 2d 1067, 1069, 44 Md App. 358,

and the "Public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 86 S.Ct. 669, 383 U S 75, 15 L Ed 2d 597,

and "Those employees who occupy position in government which have such apparent importance, that public has independent interest in the qualification and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." A.S. Abell Co. v. Barnes, 265 A 2d 207, 214, 218, 258 Md 56.

In light of the above definitions of a Public Official, it is obvious that Terry as an established low level I.R.S. employee

by the lower court (writ p.13a) she certainly does not qualify for the position of a "Public Official",as claimed.

In light thereof Terry's submitted claim,unsubstantiated,in her writ and the submitted Brief Amicus Curiae presenting her defense as a public official on page 2,6,7,8,10,11,12,13,18,20,21,22,24 and 29 is clearly again frivolous and finds no support in law.

Terry also claims in her writ on page 8 and 10 that the lower Court's decision may force I.R.S.employees to litigate a constitutional damage suit like this instant one. The facts in this instant case show to the contrary. The government by and through its attorneys litigated for Terry free of cost to her,paid out of taxpayers funds. Also the Bill of Costs awarded to Bothke against Terry was arranged by Terry through conspiracy with the attorneys of the U.S.Department of Justice

to be paid out of the U.S.Treasury, taxpayer's funds, in complete disregard of the Ninth Circuit's order. Bothke by motion strongly objected to such unlawful and unauthorized conduct to the lower court. (Motion pending).

It becomes obvious that by condoning such unlawfull arrangements by the Department of Justice(?) there exists no incentive for I.R.S.employees to comply and to obey the law , which constitutes disobedience against this very Courts established doctrine as set forth herein.

> "If collectors***and other revenue officers did nothing more than the law authorized them to do,neither they nor the government would be liable in damages;while,if they acted illegally they would be personally liable in damages,not the government."U.S.v.Cumming,Ct.Cl. 9 S.Ct. 583,130 U S 452,32 L Ed 1029.

This was also enforced by the 2nd Circuit stating:"Liability under Civil Rights Act for damages is entitrely personal in nature and is intended to be satisfied out of individuals own pocket." Sostre v.McGinnis,(CA,2,1971)442 F 2d 178,cert.den.404 U S 1049,30 L.Ed 2d 740,92 S.Ct.719,cert.den.405 U S 978.

On page 8,9,and 10 of her writ,Terry begs,inspite of her expertise based on received special training to deal with the complexities of the Code provision,(p.9) for immunity by implying that the lower court's decision transforms the Code into a minefield,(p.8)wherein she labors at her own risk. How pittyful her special trained position is compared to million of taxpayers who tip-toe every year untrained through this complex minefield,the Revenue Code, at their own risk,many financial penalized, based on countless court records,without having the benefit to claim any immunity. (See levied penalty against Bothke in App.A,without liability.)

Terry's plea for immunity in light of her duty and obligation towards Bothke,to obey Section 6213 and its intent,26 U.S.C. a clearly established,undisputable statutory and constitutional right,in complete harmony with the due process safeguards se-

cured under the Fifth Amendment,is incomprehensible and clearly frivolous,due to the fact that she was warned and in view of the fact that she knew.(See Facts No: 9,10,11,12 and 13.supra.)

Terry's cited authorities,to mention only a few: Butz v.Economou,supra,Harlow v.Fitzgerald,457 U S 800,Stankevitz v.I.R.S., 640 F 2d 205 and Wood v.Strickland, 420 U S 308, fly right back into her face as these authorities do not support her claimed position,but support Bothke's beyond any doubt based on the facts in the record;Which constitute no defense at all but merely irrelevant ramblings.

Terry states that the mere violation of a provision of the Internal Revenue Code was an error(writ p.7 & 8) ,when in fact she was warned twice by Bothke and knowingly and willfully deprived Bothke of his property without due process of law by playing the role of prosecutor,judge,

juror and marshal, established by the lower Court in its decision. Terry failed to correct the inefficiencies complained of by Bothke, which the court in Butz, supra, established as willful conduct.

Again, taxpayers are penalized for disregarding and mere violations of Code provisions, liberally applied by persons like Terry.

Terry failed to state that Bothke in protection of his property rights, based on Terry's illegal levy, was compelled to resign from his 12 year employment and suffered loss of fifteen months in wages, before finding new employment, lost benefits, financial hardship and was compelled to initiate three lawsuits to the appellate level for the return of his rightfully earned property. In addition Bothke suffered a totally disrupted life, due to studying, writing, typing of numerous legal documents, mental distress for over four years

without free counsel being paid for out of taxpayers funds,caused by Terry's irresponsible unlawful and unreasonable conduct.

This Court is respectfully requested to take judicial notice of the case Bothke v. Racca,82-5285 (CA9,1982) pending,collateral to this instant case,wherein the defendant Racca,a revenue employee,is sued for the same issues and facts as in this instant case. Therein the defendant Racca,also inspite of being warned by Bothke,filed a lien on Bothke's property during an Audit proceeding,for the balance of Terry's demand from Bothke,which she did not get due to Bothke resigning from his employment.

Yes,the Court read correctly! The lien by Racca was knowingly executed during an audit proceeding.

This type of ruthless and willful conduct by revenue employees explains in part Terry's advisement to this Court,on page 9 of

her writ, that allegedly 547 damage actions are pending against I.R.S. employees. The Court should also notice the fact that Racca works out of the same office like Terry does, and outdid even Terry subsequent she was held immune by the District Court.

Conducts like Terry's and Racca's in conjunction with a reversal of the lower Court's decision in this instant case would really stand the constitution on its head and declare Bothke's rights thereunder as null and void, to which no court has authority to do so.

The decision in the Brief of Amicus Curiae submitted by Terry clearly is in part irrelevant to this case, based on the position of a public official and violations of only regulatory guidelines as set forth therein, inapplicable to these issues herein above; But the decision therein supports strongly Bothke's position in so far

that the decision of the court therein did not even tolerate the regulatory guidelines violation by a public offical.

Particularly Wood v.Strickland,supra,supports Bothke by stating:

> "If the law was clearly etsablished the immunity defense should fail even with public officials,we provide no license to lawless conduct, and a person who suffers injury caused by such conduct may have cause of action":(at 411) and
> "Subject good faith a question of fact requiring resolution by jury is not to be decided on motion for summary judgment. (at 411).

Bothke's complaint was dismissed by summary judgment as the record shows in contradiction with Wood v.Strickland,supra,which scholarly the lower court recognized in its decision by remanding the case to the District Court.

The fallacy in Terry's defense is also demonstrated by the well established and well stated decision in Oliver Wendell Holmes,Autocrat at the Breakfast Table, p. 4 (1900) that: "There is nothing like

facts to ruin even a perfectly good argument." The Opinion of Justice Brandeis in Olmstead v.U.S.,227 U S 438,483,48 S.Ct. 564,574,72 L Ed 944 (1928) presents a proper closing to this argument by stating:

> "Decency,security and liberty,alike demand that government officials shall be subject to the same rules of conduct that are command to the citizen.In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.
> Our government is the potent,the omnipresent teacher,for good or for ill,it teaches the whole people by its example.
> Crime is contagious.If the government becomes a lawbreaker,it breeds contempt for the law;it invites every man to become a law unto himself; it invites anarchy.
> To declare that in the administration of the criminal law the end justifies the means*** would bring terrible retribution.
> Against that pernicious doctrine this Court should resolutely set its face."

CONCLUSION.

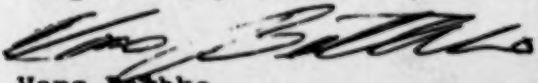
It is respectfully submitted that petitioner has wholly failed to sustain her burden of establishing under Section 6213,26 U.S.C. and 7214 and the Fifth Amendment

that there are special and important reasons why the writ should be granted.

The decision below did not involve an important question of federal law which has not been settled by this court, nor has the court of appeals decided a federal question in a way to conflict with applicable decisions of this Court or other Court of Appeals on the same matter.

The petitioner's Writ for Certiorari is based on the facts in the record clearly frivolous and this Court should award Bothke $ 500.00 Cost for being compelled unjustly to respond to the unjustified petition meritless in fact and law, and wasting this honorable Court's valuable time.

Respectfully submitted,



April 6, 1984. Hans Bothke,
Respondent in pro per.

APPENDIX A

DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE CENTER
P.O.BOX 12586

HANS BOTHKE
400 S.Flower LL 156
Orange CA.92668

MARCH 5,1979

CORRECTION TO ARITHMETIC TAX STATEMENT

In checking the arithmetic on your income tax return, we had to make corrections for the reasons shown below.

Tax withheld 1,154.62

BASED ON THE INFORMATION RECEIVED, WE HAVE ADJUSTED YOUR RETURN ACCORDINGLY.

Balance Due I.R.S. $ 6,177.87

Penalty: 280.06 Interest: 296.63

Code number 01
A penalty has been added because your return was not filed and your tax was not paid when due.

Code number o9
Interest as provided by law is figured from the due date of the return to the date of full payment or the date of this notice.
Please let us know if you believe the balance due is incorrect for reasons other than uncredited payments.Just return this notice with the correct payment and an explanation to account for the difference.
If you write,please return this notice to help us identify your account.*

This notice is not the result of an examination of your return. We notify the taxpayer when we select a return for examination.